

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>RONALD THOMAS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>BUTLER TRANSPORTATION COMPANY</b>	)	Docket No. 230,756
Respondent	)	
AND	)	
	)	
<b>KANSAS TRUCKERS RISK</b>	)	
<b>MANAGEMENT GROUP</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed Administrative Law Judge Robert H. Foerschler's March 27, 2000, Award. The Appeals Board heard oral argument on July 19, 2000.

**APPEARANCES**

Claimant appeared by his attorney, Steven D. Treaster of Overland Park, Kansas. Respondent and its insurance carrier appeared by and through their attorney, J. Scott Gordon of Overland Park, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

Claimant alleges he injured his neck, both shoulders, and aggravated a parotid tumor located below his left ear during an altercation with respondent's employee on January 16, 1998. As the result of these injuries, claimant contends he has accumulated various medical treatment expenses, was unable to work, and suffered a permanent disability.

Accordingly, claimant requests are for payment of medical treatment expenses, temporary total disability benefits, and permanent partial general disability benefits.

The Administrative Law Judge denied claimant's request for workers compensation benefits concluding there had been a scuffle between claimant and some of respondent's management employees on January 16, 1998. But claimant failed to prove he suffered any permanent injuries or disability as a result of that scuffle.

On appeal, claimant argues the medical evidence contained in the record plus claimant's testimony proves claimant suffered permanent injuries and permanent disability as a result of the altercation. Claimant urges the Appeals Board to reverse the Administrative Law Judge's Award and enter an order requiring the respondent to pay all medical expenses as authorized, temporary total disability benefits, and permanent partial general disability benefits based on claimant's permanent functional impairment. Claimant has returned to work for another employer as an over-the-road truck driver earning more money than he did when he was employed by the respondent. Accordingly, work disability is not an issue.<sup>1</sup>

In contrast, respondent requests the Appeals Board to affirm the Administrative Law Judge's Award. The respondent contends claimant's testimony is inconsistent and is not credible. Respondent argues, in order to find this claim compensable, one has to believe claimant's testimony, and respondent argues claimant simply was not truthful and is not believable.

Because workers compensation benefits were denied, the issues before the Appeals Board are the same issues as listed in the Award.

1. Did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?
2. Is claimant entitled to temporary total disability benefits?
3. Is claimant entitled to payment of medical expenses as authorized medical expenses?
4. Is claimant entitled to future medical treatment?
5. What is the nature and extent of claimant's disability?

At oral argument, the parties agreed, if the claim was found compensable, the Appeals Board should decide the issues not reached by the Administrative Law Judge.

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<sup>1</sup>See K.S.A. 1997 Supp. 44-510e.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board makes the following findings and conclusions:

The Administrative Law Judge has set out in the Award the substantial facts of this case. There is no reason for the Appeals Board to repeat those facts in this Order. Therefore, the Appeals Board adopts those findings of fact as its own and incorporates those findings in this Order.

In proceedings under the Workers Compensation Act, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of compensation and prove the various condition on which that right depends.<sup>2</sup> In the Award, the Administrative Law Judge found claimant had not met this burden because of certain defects in the evidence. Also, the Administrative Law Judge found "claimant's protest of veracity is somewhat sullied by other admissions in the record." The Administrative Law Judge went on to find there had been a scuffle between claimant and respondent's employees that occurred on January 16, 1998. But the Administrative Law Judge found "there are no persistent symptoms resulting from this (scuffle) that appear to have resulted medically from this incident, either directly or as an aggravation of some pre-existing condition, and consequently, no award is made in favor of Mr. Thomas."

The Appeals Board concludes the question of whether claimant suffered permanent injuries and permanent disability as a result of the January 16, 1998, altercation hinges on claimant's credibility. The persuasive medical evidence completely rules out claimant's allegation that his preexisting parotid cancerous tumor was either caused or aggravated by the January 16, 1998, altercation. Peter A. Selz, M.D., an otolaryngologist located in Belleville, Illinois, surgically removed the tumor on February 6, 1998. Dr. Selz testified unequivocally that the parotid tumor was neither caused nor aggravated by the altercation.

The Appeals Board finds the actual severity of the altercation is suspect. Claimant description of the altercation is completely different than the description given during respondent's Vice President of Operations Michael Green's testimony and payroll clerk Shelly Webb's testimony. Claimant testified he was attacked for no reason by Mr. Green and respondent's owner, Mr. Butler, along with three other employees after claimant had signed a form concerning the continuation of health insurance because of his resignation. Claimant testified that respondent's employees put him in a head lock, punched him, and threw him against the wall injuring his neck and shoulders.

In contrast, both Mr. Green and Ms. Webb testified that claimant started yelling, cussing, and creating a disturbance after he was given his check. Claimant was told the respondent was going to deduct expenses for picking up the truck in Illinois from the other checks he was owed. Mr. Green was in an adjacent office, heard claimant yelling, came

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<sup>2</sup>See K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

out of his office, told claimant to quit yelling and to leave the premises. Claimant did not stop yelling so Mr. Green again told him to leave and approached claimant. At that time, claimant raised his arms like he was going to hit Mr. Green or shove him. Mr. Green then grabbed claimant by the arms and pushed him out of the office through the door. Both Mr. Green and Ms. Webb testified no one either punched, put claimant in a head lock, or shoved claimant against the wall as alleged by the claimant. Mr. Green was the only employee of respondent's who participated in removing claimant from the office.

At the regular hearing held in this matter, claimant also testified Ms. Webb had not been present in the office when the altercation occurred on January 16, 1998. Ms. Webb was also present at the regular hearing and again testified she was present in the office on January 16, 1998, and saw the altercation. She testified claimant had called her earlier in the day and told her not to mail his check because he was going to pick it up. Further, Ms. Webb testified she was the one who actually gave claimant his paycheck.

After the altercation, as verified by medical records from the University of Kansas Medical Center Emergency Department, claimant sought treatment for alleged neck and shoulder injuries allegedly caused by an assault of employees at work. The primary focus of the medical treatment claimant received was not for the alleged neck and shoulder injuries but was concentrated on the mass the physician found located inferior to claimant's left ear. That mass was biopsied and sent to pathology for examination and report. The emergency department physician instructed claimant to have follow up treatment for the unidentified mass immediately and did not make any recommendation for further medical treatment for claimant's bilateral shoulder and neck complaints.

Before claimant was employed by the respondent in October of 1997, he had received extensive conservative treatment from medical physicians and a chiropractic physician for neck and right shoulder injuries. Claimant was taking a bath on February 2, 1997, when ceiling material fell on his neck and shoulders.

After claimant returned to Illinois following the January 16, 1998, altercation, he again returned to the same chiropractor for treatment who had previously treated claimant for the February 2, 1997, neck and shoulder injuries. The chiropractor treated claimant extensively on a regular basis with the same treatment regimen for neck discomfort and now for left shoulder pain instead of right shoulder pain. These extensive treatments started on January 19, 1998, and continued through May 15, 1998, when the chiropractor released claimant to return to work with no restrictions having met maximum medical improvement. Claimant testified at the regular hearing held on December 7, 1999, although he remained symptomatic, he had not returned for any further chiropractic treatment.

The only objective medical findings, contained in the extensive medical record in this case, are degenerative changes in claimant's cervical spine primarily at the C5-C6 disc level. In order to find the claimant has a permanent injury and disability after the January 16, 1998, altercation, claimant's subjective complaints have to be believed. The Appeals Board concludes, when the record is taken as a whole, claimant is not believable.

Claimant's credibility is first questioned because he started out lying to the respondent as to the reason he needed to delay transporting his load to Kansas City, Kansas. He told respondent he needed surgery when he actually needed the delay to complete an employment physical for another employer. Claimant's description of the severity of the altercation is also suspect because a completely different description of the altercation is given by two of respondent's employees. Claimant also denied he was using profanity in respondent's office on January 16, 1998. Claimant testified "I am sanctified holy ghost preacher. I do not curse." Furthermore, claimant at the regular hearing even denied that payroll clerk Shelly Webb, who testified that she gave him the paycheck, was present when the altercation occurred on January 16, 1998.

At the first preliminary hearing held in this matter on March 26, 1998, claimant complained of headaches, pain, and stiffness in his neck and left shoulder. The records of the chiropractor who treated claimant after the altercation indicate that claimant was treated for headaches, neck pain, and also left shoulder pain. The chiropractor referred claimant for further examination to pain management physician Karl E. Swanson, M.D. Dr. Swanson did not testify but his records were made part of the record and indicated that claimant's chief complaint was left arm pain.

At the second preliminary hearing held on October 15, 1998, claimant again complained of headaches, neck pain but he testified he now had right shoulder pain instead of left shoulder pain. The right shoulder complaints were the same complaints as claimant had following the February 2, 1997, accident.

Additionally, the Appeals Board concludes the most persuasive medical testimony contained in the record is that of orthopedic surgeon Don B. Miskew, M.D., who examined claimant on two separate occasions. Dr. Miskew was appointed by the Administrative Law Judge to perform the independent medical examinations of claimant. Dr. Miskew examined claimant on January 27, 1999, and June 10, 1999. He found claimant with severe degenerative disc disease with spur formation at the C5-6 level. After reviewing claimant's medical treatment records and conducting a physical examination of claimant, Dr. Miskew, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, assessed claimant with a six percent whole person permanent functional impairment for his cervical spine condition. But Dr. Miskew opined the permanent functional impairment rating was the same as claimant had before the January 16, 1998, altercation. He attributed no additional permanent functional impairment to that incident.

The Appeals Board, therefore, concludes claimant suffered only a temporary injury to his neck and shoulders during the altercation that occurred at respondent's office on January 16, 1998. This temporary injury did not result in any additional permanent functional impairment to claimant's cervical spine. Respondent should be responsible for the medical treatment claimant received for his neck and shoulders at the Kansas University Medical Center Emergency Department on January 16, 1998. That cost would not include the cost for the treatment of the preexisting mass that was eventually diagnosed as a parotid cancerous tumor which the Appeals Board finds not work related. The Appeals

Board has examined the medical bills contained in the record and finds that the respondent should pay KU Physicians, Inc. \$120.00 and Kansas University Medical Center \$184.00.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's March 27, 2000, Award should be and is hereby, reversed and an Award is entered as follows:

**WHEREFORE, AN AWARD OF MEDICAL COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Ronald Thomas, and against the respondent, Butler Transportation Company, and its insurance carrier, Kansas Truckers Risk Management Group, for an accidental injury which occurred on January 16, 1998, which caused only a temporary injury to claimant's neck and shoulders.

Respondent is ordered to pay medical expenses to KU Physicians, Inc. in the amount of \$120.00 and to the Kansas University Medical Center in the amount of \$184.00.

Because the Award is for only a temporary injury or a temporary aggravation of a preexisting condition, the respondent and insurance carrier have no responsibility for any medical expenses for treatment of claimant's neck and shoulders after the treatment he received at the University of Kansas Medical Center on January 16, 1998.

No award is made for future medical treatment, temporary total disability compensation, or permanent partial disability compensation arising out of the January 16, 1998, accident.

Claimant is entitled up to the statutory limit for unauthorized medical expense.

All of the transcript costs listed in the Award are ordered paid by the respondent and insurance carrier.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 2000.

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BOARD MEMBER

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BOARD MEMBER

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**BOARD MEMBER**

c: Steven D. Treaster, Overland Park, KS  
J. Scott Gordon, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director